
IN THE
United States Circuit Court of Appeals
 FOR THE
 NINTH CIRCUIT

IN THE MATTER OF THE AP-
 PEAL OF THE EQUITABLE
 TRUST COMPANY FROM
 THE ORDER ISSUING THE
 INJUNCTION, DATED FEB-
 RUARY 21, 1916.

**The Motion to Dismiss the Appeal for Failure
 to Serve Citation has been Waived.**

COPY OF BRIEF FILED IN THE LOWER COURT
 DEALING WITH THE MERITS OF THE CON-
 TROVERSY PRESENTED ON APPEAL.

MURRAY, PRENTICE & HOWLAND,
 JARED HOW,
 W. E. S. GRISWOLD,

Attorneys for Equitable Trust Company
 of New York.

F. W. M. CUTCHEON,
 JOHN F. BOWIE,
 Amici Curiae.

Filed this.....day of March, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

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IN THE MATTER OF THE AP-
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THE MOTION OF THE RECEIVERS TO DISMISS THE
APPEAL FOR FAILURE TO SERVE CITATION
HAS BEEN WAIVED.

On the hearing of the appeal in the above entitled cause, the Receivers appeared and moved to dismiss the appeal on two grounds:

(1) On the ground that the citation had not been issued and served upon them;

(2) On the ground that the order appealed from was not an appealable order.

Since these motions have been made the Receivers

have filed their brief dealing with the appeal on the merits, as well as a brief dealing with the motion to dismiss.

The action of the Receivers in moving to dismiss the appeal on the ground that the order was not an appealable order, constitutes a waiver of the motion to dismiss on the ground that citation was not issued and served. This was expressly decided in the case of *Andrews v. National Foundry*, 77 Fed., 774, in which case the Court of Appeals for the Seventh Circuit said:

"They waived citation by joining in the motion at our last term to dismiss the appeal because the decree below was not final."

At the hearing of the cause, Mr. McEnerney stated that he refrained from arguing the case on the merits because that would constitute a waiver of the motion to dismiss for failure to serve citation. Since the appeal has been argued, however, counsel have filed a brief upon the merits. This itself operates as a waiver of the motion to dismiss.

Richardson v. Green, 130 U. S., 104;

Renaud v. Abbott, 116 U. S., 227.

In *Richardson v. Green* the Court said:

"The issuing of a citation may be waived by the

appellee, and a general appearance by him is a waiver of a citation."

The brief filed is entitled "Brief on Appeal," and unquestionably constitutes a general appearance, dealing with the subject, as it does, upon the merits, and incorporating the brief on the merits filed in the lower Court.

It may be stated that counsel for the Receivers appeared in this Court pursuant to an order of the Judge of the lower Court, which order is in the following language:

"It appearing that The Equitable Trust Company of New York, plaintiff in the above entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that the said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

March 13th, 1916.

WM. C. VAN FLEET,
United States District Judge."

We file herewith copies of the brief of Mr. How, filed in the lower Court, dealing exclusively with the

interpretation of Contract B, and the merits of the appeal.

Respectfully submitted,

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JARED HOW,

W. E. S. GRISWOLD,

Attorneys for Equitable Trust Company of New York.

F. W. M. CUTCHEON,

JOHN F. BOWIE,

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